



Supply in the course or furtherance of business

Issue to knock the Courts'
door soon...



Goods and Services Tax ('GST') being a new law in a cloudy field of taxation, has its own teething issues. These are the days of confusion and conflicts; dissenting views and opinions along with numerous jurisprudential mumblings. This article discusses the issue involving the interpretation of the phrase '***in the course or furtherance of business***' ('business test') vis-à-vis a supply. A similar issue involving the 'business' test has also been debated upon since the erstwhile Sales Tax regime dating back to the 1960s. Since taxability as well as availment of seamless credit under GST regime is subject to this business test, the stakes have become larger for a taxpayer.

Business test - An analysis

Scope of 'Supply'

The taxable event under GST is 'supply' which is defined in an inclusive manner¹. Thus, the moot question which arises is whether a non-business activity can also be considered as a 'supply'?

The Karnataka Authority for Advance Ruling ('AAR') held² that the transfer of business as a going concern is not an activity in the course or furtherance of business. AAR further held that the definition of 'supply' is an inclusive definition and hence, the scope of expression 'supply' goes beyond the activities 'in the course or furtherance of business'.

In the Press Release dated July 13, 2017, the Government clarified that the

sale of old gold by an individual, does not attract GST as it is not in the course of furtherance of his business.

It is settled legal position that the word 'include' sometimes connotes a specific meaning as 'means and includes' or 'comprises' or 'consists of'. Thus, this word is susceptible of another construction and connote limitation in certain contexts.

In the present context, we are dealing with a charging provisions and therefore the ambit of the word 'supply' must be restricted by the expression 'in the course or furtherance of business' unless specifically expanded.

¹ Section 7 of the Central Goods and Services Tax Act, 2017

² Rajashri Foods Private Limited 2018 (5) TMI 1651 (AAR Karnataka)

³ Section 2(17) of the Central Goods and Services Tax Act, 2017

Scope of 'business' in 'business test'

The next question to ponder upon is the determination of the main activity or purpose for which an entity is established.

Relevance of profit motive?

The definition of 'business'³ suggests that pecuniary benefit is not relevant to determine whether an activity constitutes to be business or not. It is notable that instead of using the expressions like 'with or without profit motive' (used in erstwhile sales tax regime) or 'whether or not for a benefit', the legislature has consciously used the word 'pecuniary'⁴ which only relates to money.

This argument of 'profit motive' has been extensively dealt by the Supreme Court⁵ where the question arose as to whether sale of unclaimed goods by the Port Trust of Madras are exigible to sales tax or not. The Court held that the Port Trust is not involved in any activity of 'carrying on business' and the sale of these items are also a miniscule part of the Port Trust's main activities. These sales are in connection with or ancillary to the main

'non-business' activities of the Port Trust.

In another landmark judgement of the Apex Court⁶, the Court held that the main objective of Sai Baba Trust is to spread the message of Sai Baba. In the absence of profit motive, it cannot be said that the trust was carrying on trade or commerce. Court also concluded that the inclusion of expressions 'incidental or ancillary activity' in the definition of "business" pre-supposes the existence of trade, commerce etc.

In another case⁷, the taxpayer was purchasing cotton for research activity and selling the cotton waste resulting therefrom. The Madras High Court held that the institute was solely constituted for the purpose of research and was not carrying on 'business'. Thus, these sales would not be subject to sales tax.

Inclusion of other activities?

Going further, the legislative intent is also important element in construing the definition of 'business'.

In the context of sales tax, the Bombay High Court⁸ held that if the intention of

⁴ The word 'pecuniary' is an adjective of the latin word 'pecunia' which means 'money or real or personal property'

⁵ State of Tamil Nadu v. Board of Trustees of the Port of Madras (1999) 4 SCC 630

⁶ CST v. Sai Publication Fund (2002) 4 SCC 57

⁷ Deputy Commissioner (C.T.) Coimbatore v. South India Textile Research Association (1978) 41 STC 197 (Mad.)

⁸ State of Bombay v. Ahmedabad Education Society (1956) 7 STC 497 (Bom.)

⁹ Panacea Biotech Limited v. Commissioner of Trade and Taxes (2013) 59 VST 524 (Del.)

¹⁰ Posco India Pune Processing Centre Private Limited 2019 (2) TMI 63 (AAR-Maharashtra)

¹¹ Caltech Polymers Private Limited 2018-TIOL-20-AAAR-GST (Kerala)

¹² Like research, healthcare, education whose object is public welfare / humanitarian and not to get any other benefit

¹³ Like sale of old motor vehicle by a business entity engaged in manufacturing of air conditioners

the legislature was to tax every sale or purchase irrespective of the object of the activities; there was no necessity to incorporate the condition to “carry on the business” of selling, buying etc. in the statute.

In the erstwhile VAT regime, the Delhi High Court⁹ held that where the main business of a company is to sell pharmaceutical products, the sale of used cars could not be characterized as ‘ancillary’ or incidental to its business.

A similar issue came up in GST regime as well. The AAR¹⁰ was dealing with an Applicant engaged in supply of steel coils who was making recovery of parental health insurance premium from employees. The AAR held that the Applicant cannot be considered to be supplier of insurance service when it makes insurance recovery from its employees.

Important to note that a contrary view

has also been adopted in GST by AAAR¹¹ wherein the recovery of foods expenses from employees, was said to be a supply in the course or furtherance of business.

Conclusion

In the authors’ view, non-economic activities¹² and certain economic activities¹³ does not satisfy the business test by any stretch of imagination and thus, will not constitute to be a ‘supply’ under the GST law. One point that can succinctly be concluded is that before subjecting an activity to GST, the foremost question that needs to be answered is whether an activity is in the course or furtherance of business or not. The issue being prone to legal interpretations, will surely be contested by revenue authorities in the near future. Thus, a taxpayer opting not to pay GST basis non-qualification of the business test, need to be well equipped with a legal umbrella to protect itself from the monsoon of litigations that lies ahead.



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